

Gerard Bor, a Minor, by William Cooper, Esq; } Appellant.
his Guardian, - - - - -

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Jacob Bor, Esq; Helena Maria Bor Widow, Mary
Bor Widow, Sir Thomas Taylor, Bart. William
Longfield, Bridges Baldwin, Esq; Boleyn Whit- } Respondents.
ney, Esq; and William Williams, Gentleman,

The Respondent Jacob Bor's CASE.

Margaret Bor, the Respondent's Grandmother, and Great Grandmother of the Appellant, being seised in Fee-simple of several Lands and Hereditaments in the Counties of *Dublin* and *Wicklow*, and of several Houses and waste Grounds in the City of *Dublin*; and having Issue *Christian Bor* her eldest Son, *Jacob Bor* her second, and *Benjamin* her third Son, on the 30th of *August* 1690, duly made her Will, and thereby devised to *Christian*, for Life, the Castle, Town, and Lands of *Ballyawly* and *Edmonstown* in the County of *Dublin*, ten Acres of Land in the Fields leading to *Dunbor* in the County of *Wicklow*, and a House in *Back-lane*, *Dublin*; Remainder to his first and other Sons successively in Tail Male: And likewise devised to *Christian* her Dwelling-house in *Great Butter-lane*, and several Houses and Tenements in *Keven's-street*, in *Dublin*, in which the Testatrix had only Leasehold Interests.

Margaret Bor's Will. Devise to Christian, her eldest Son.

Devise to Jacob, her second Son.

Devise to Benjamin, her third Son.

Power to settle Jointure, and raise Portions for younger Children.

1691 Margaret died.

Christian's Marriage Settlement.

And devised to her Son *Jacob*, for his Life, several Houses in *Michael's-lane*, *Schoolhouse-lane*, and some waste Ground lying between them, (and on which some Buildings have been since erected, called *Bor-court*) in the City of *Dublin*; with Remainder to his first and other Sons in Tail Male: And in Default of such Issue, to *Benjamin* for Life, and to his first and other Sons in Tail Male: And in Default of such Issue, to *Christian* for Life; Remainder to his first and other Sons in Tail Male; with Remainder to her own right Heirs.

And devised the Town and Lands of *Pelletstown*, in the County of *Dublin*, to *Benjamin* for Life; Remainder to his first and other Sons in Tail Male: And in Default of such Issue, to *Jacob* and his Sons in like manner; Remainder to *Christian* and his Sons in like manner; with Remainder to her own right Heirs.

And the said *Margaret* by her said Will impowered *Christian* to settle a Jointure, not exceeding 200*l.* a year; and impowered every one of her Sons, when in Possession of the respective Estates to them so limited, to charge the same with any Sums not exceeding a Moiety of the Value thereof, for Portions of younger Children, to be distributed amongst them in such manner as they should by Will or any other Writing appoint.

Margaret died in 1691, and *Christian*, *Jacob*, and *Benjamin* became respectively seised and possessed of the several Estates so devised to them.

In the Year 1717, *Christian* intermarried with *Helena Maria Longfield*; but previous to and in Consideration of such Marriage, and of 1800*l.* her Marriage Portion, by Lease and Release, dated respectively the 1st and 2d of *July* 1717, (the Release reciting the several Powers he had under the said Will) conveyed the Premises thereby devised to him unto *William Longfield* and *Richard Nutley*, Esqrs. to the Use of himself for Life; and after his Death to the Intent that *Helena* should, during her Life, receive 200*l.* a Year out of *Ballyawly* for her Jointure; and that they should, by Sale or Mortgage thereof, raise any Sum not exceeding 2000*l.* for Portions for younger Children, to be equally divided amongst them; Remainder to the first and other Sons of the Marriage in Tail Male, with several Remainders over.

The Estates devised to Jacob and Benjamin, vest in Christian.

Jacob and *Benjamin* having died without Issue, the Lands of *Pelletstown*, and the Houses in *Michael's-lane*, *Schoolhouse-lane*, and *Bor-court*, in *Dublin*, which were devised to them, became vested in *Christian*, under the Limitations in *Margaret Bor's* Will.

And upon the Death of his Uncle *Garret*, *Christian*, as his Heir, became seised in Fee of the Lands of *Ballynunry* and *Kilcoole*, in the County of *Carlow*.

Christian Bor's Will.

Christian had Issue of the Marriage *John Bor* his eldest Son, *Gerard* his second, *Jacob* (the Respondent) his third, and *William* his fourth Son; and on the 8th *June* 1733 duly made his Will, and after reciting the Powers he had under his Marriage Settlement, charged all his Lands, Tenements and Hereditaments comprised in the Settlement, with 2000*l.* which he thereby bequeathed to his three younger Sons, viz. *Gerard*, the Respondent, and *William Bor*, equally to be divided between them.

And as to *Ballynunry* and *Kilcoole*, and *Pelletstown*, with its Subdenominations, and the Mill thereon, and the Houses in *Michael's-lane*, *Schoolhouse-lane*, and *Bor-court*, he devised the same to *Arthur Baldwin*, Esq. and *Editba* his Wife, under several Trusts; and particularly as to *Ballynunry* and *Kilcoole*, to the sole Use of his Son *Gerard* for Life; Remainder to the said *Arthur* and *Editba*, and their Heirs, to preserve contingent Remainders; Remainder, after *Gerard's* Death, to his first and other Sons in Tail Male; and in Default of such Issue, to the Respondent for Life, with the like Remainders to his first and other Sons in Tail Male; and in Default of such Issue, to *William Bor* for Life, with the like Remainders to his first and other Sons in Tail Male; and in Default of such Issue, to *John* his eldest Son for Life, and to his first and other Sons in Tail Male; Remainder to his own right Heirs.

And as to *Pelletstown*, and the Houses in *Michael's-lane*, *Schoolhouse-lane*, and *Bor-court*, to the Use of his Sons *Jacob* (the Respondent) and *William Bor*, during their Lives, to be equally divided between them; Remainder, as to the Moiety of them devised to the Respondent, to his first and other Sons in Tail Male; and in Default of such Issue, then to *William* for Life, Remainder to his first and other Sons in Tail Male; and for want of such Issue, to *John* his eldest Son for Life, Remainder to his first and other Sons in Tail Male; and in Default of such Issue, to *Gerard* for Life, Remainder to his first and other Sons in Tail Male; with Remainder to the Testator's right Heirs.

And the other Moiety of *Pelletstown*, and the Houses, he devised, after the Death of *William*, to his first and other Sons in Tail Male; and for want of such Issue, to *John* for Life, Remainder to his first and other Sons in Tail Male; and for want of such Issue, to *Gerard* for Life, Remainder to his first and other Sons in Tail Male; and for want of such Issue, to the Respondent for Life, Remainder to his first and other Sons in Tail Male; with Remainder to the Testator's right Heirs.

And the Testator, considering that *Ballynunry* and *Kilcoole*, which he devised to *Gerard*, (then worth above 100*l.* a Year, and which, upon the Expiration of some Leases, would be worth 300*l.* a Year) was a large Provision for *Gerard*, in case he had not a Right to dispose of *Pelletstown* and the Houses in *Dublin*, as he by his Will designed, inserted the following Proviso:

"Provided always, and it is my further Will and true Meaning, that in case my Title and Estate of and in the said Lands of *Pelletstown*, and my said Houses in *Michael's-lane*, *Schoolhouse-lane*, and *Bor-court*, is and so stands, that I cannot leave and devise the same in such Manner, and to such Uses, as by this my Will I design and is intended, then and in such Case the Share and Part of the said Sum of 2000*l.* mentioned in my Settlement, by this my Will left and devised to and intended for my said Son *Garret*, shall not go to the said *Garret*; but shall go, and I do hereby leave the same, equally to be divided between my said two younger Sons, *Jacob* and *William*, Share and Share alike, any thing before in this my Will contained to the contrary notwithstanding.

And

Christian's
Death.

And the Testator appointed his Wife *Helena* his sole Executrix, and Guardian to his Sons, who were then all Minors, and died on the 10th of *June 1733*.

Upon the Death of *Christian*, the Lands of *Pelletstown*, and the Houses in *St. Michael's-lane*, *Schoolhouse-lane*, and *Bor-court*, under the Limitations in *Margaret Bor's* Will, vested in *John Bor* as his eldest Son and Heir Male, but *Helena* entered and received the Profits, as Guardian under the Will of *Christian*, down to the Death of *John*, who never received any Part of them.

Gerard became seised of *Ballynurry* and *Kilcoole*, under the Will of his Father *Christian*.

John Bor's Con-
veyance to Wil-
liams.

In 1739, *John Bor* attained the Age of 21 Years; and soon after, as well to carry into Execution his Father's Intentions as to prevent any Disputes in the Family, concerning the Testator's want of Power to devise *Pelletstown* and the Houses, he, for the Consideration of 900 *l.* paid to him by *Helena*, by Deed, dated the 27th Day of *March 1739*, conveyed to *William Williams*, Gentleman, and his Heirs, *Pelletstown* and the Houses in *Michael's-lane*, *School-house-lane*, and *Bor-court*, in Trust for the Respondent and *William Bor*, and their Issue, under the same Limitations as in *Christian's* Will, and covenanted to levy Fines and suffer Recoveries, and accordingly did levy Fines thereof, but neglected to suffer Recoveries.

John Bor's Will.

As to the *Ballyawley* and *Edmonstown* Estate, of which a Remainder was limited by *Margaret's* Will to *Gerard*, (the Appellant's Father) in Default of Issue Male of *John*, a Recovery was suffered by *John*.

In *September 1741* *John Bor* made his Will, and devised to *Boleyn Witney*, Esq; and the said *William Williams*, and their Heirs, all his real Estate, Lands and Reversions, to the Use of the Respondent for Life, Remainder to his Heirs Male, and their Heirs Male, with other Remainders over, and died in *October* following, unmarried and without Issue.

By the general Devise of this Will, the *Ballyawley* and *Edmonstown* Estate, (of which *John* had made himself Tenant in Fee, by the Recovery which he suffered) past to the Respondent *Jacob*, subject to the Charge of 2000 *l.* and his Mother's Jointure of 200 *l.* a Year, by the Settlement of 1717, and to a Legacy of 6000 *l.* charged upon it by the Will, for her Benefit.

Upon *John's* Death, *Gerard*, the Appellant's Father, without any regard to *Christian's* Will, claimed the Possession of *Pelletstown* and Houses in *Dublin*, under the Remainder in *Margaret Bor's* Will; and having attained his full Age in *November 1741*, soon after filed a Bill in the Court of Chancery of *Ireland*, to be decreed to the Possession, and an Account of the Profits thereof: Upon which the Possession was given up by *Helena*, who had received as Guardian of her two Sons, *Jacob* and *William*; and the Rents from *John's* Death were accounted for with him; and *Gerard* immediately after levied Fines of *Pelletstown* and the Houses, and mortgaged them for 3600 *l.* to *Sir Thomas Taylor*, Bart.

Death of Wil-
liam Bor.

William Bor died 9th *April 1744*, under Age, intestate and without Issue, and *Helena* obtained Administration to him.

Gerard Bor's
Bill.

Gerard, on the 26th *January 1744*, in further Violation of his Father's Will, exhibited his Bill in the said Court against the Respondent, and *Helena*, as Administratrix of *William*, and the Trustees in the Settlement of 1717, to be decreed to a Third of the 2000 *l.* charged on the Estates of *Ballyawley* and *Edmonstown*, as Portions for the three younger Sons, and to one Third of another Third of the said 2000 *l.* as his distributive Share of *William's* Proportion thereof; to which Bill *Helena* and the Respondent put in their several Answers; and the Respondent insisted that the said *Gerard* was not intitled to any Part of the 2000 *l.* as he had disappointed his Father's Will by taking *Pelletstown* and the Houses in *Dublin*, devised to *William* and the Respondent; and that he the Respondent was intitled to 1000 *l.* Part of the 2000 *l.* and to a Compensation out of *Ballynurry* and *Kilcoole*, of which *Christian* died seised in Fee, for the Value of such Part of *Pelletstown* and the Houses divided to him, as *Gerard* had evicted him of.

Respondent's
Answer.

Respondent's
Bill, filed
22d November,
1744.

The Respondent filed his Bill against *Gerard Bor*, *Helena*, as Executrix of *Christian*, *William Longfield*, as surviving Trustee in the Settlement of 1717, *Robert Baldwin*, as Heir of *Arthur* and *Editba*, Trustees in *Christian's* Will, and against *Boleyn Whitney*, and *William Williams*, as Trustees in *John's* Will; praying that in regard *Gerard* had possessed himself of *Pelletstown*, and the Houses in *Michael's-lane*, *Schoolhouse-lane*, and *Bor-court*, contrary to his Father's Will, he the Respondent might be decreed to 1000 *l.* a Moiety of the 2000 *l.* and to a Compensation out of *Ballynurry* and *Kilcoole*, to the Amount of the Value of such Part of *Pelletstown*, and the Houses, as *Gerard* claimed under *Margaret's* Will, and that *Gerard* might be obliged to relinquish any Title he might have, under *Christian's* Will and Settlement, to the 2000 *l.* And praying likewise an Account of the Rents and Profits of *Pelletstown* received by *Helena*, from the Death of *Christian* to the Death of *John*.

Gerard's An-
swer.

Gerard answered this Bill, and insisted, that he, as one of *Christian's* and *Helena's* younger Children, was intitled to One Third of the 2000 *l.* and to a distributive Share of *William's* Third thereof; and admitted he refused to make the Respondent any Satisfaction out of *Ballynurry* and *Kilcoole*, wherein he had only an Estate for Life, for *Pelletstown*, or the Houses; being advised that no such Satisfaction was intended by *Christian's* Will to be made, he having declared, that in case he was not empowered to devise *Pelletstown* and the Houses for the Use of the Respondent and *William*, he the said *Gerard* should have no Share of the 2000 *l.* and submitted to the Court, whether *Christian* had Power to devise the said 2000 *l.* merely because he wanted Title to devise *Pelletstown* and the Houses; and insisted on his Title to *Pelletstown*, under *Margaret Bor's* Will, and that *Christian*, being only Tenant for Life, had no Right to devise the same.

Gerard's Death.
Mary his Admi-
nistratrix files a
Bill of Revivor.

Helena also answered the Bill; upon which Issue was joined in that Cause, and *Gerard* soon after intermarried with *Mary Burton*; but before any further Proceedings were had, he died, on 25th *January, 1745*, leaving *Mary* eldest of the Appellant: and the said *Mary* having taken Administration to *Gerard*, on the 4th of *December 1746*, filed her Bill to revive the Suit commenced by him against the Respondent and others, for Recovery of the Third of the 2000 *l.* and a Third of *William Bor's* Share thereof.

Appellant's Bill
of Revivor.

Decree in Mary
Bor's Cause.

The Appellant by his Guardian also filed a Bill on or about 16th *January 1746*, to revive the Suit commenced by his Father for *Pelletstown* and the Houses.

Mary Bor, the Appellant's Mother, and Administratrix of *Gerard* his Father, brought her Cause to a Hearing on the 4th of *August, 1747*, when it was decreed that it should be, and was, thereby referred to Master *Stopford*, to take an Account of what was due to the Plaintiff, in Right of her Husband, for his Proportion of the 2000 *l.* provided for the Children of *Christian Bor*, by the Settlement in the Pleadings mentioned; and also to take an Account of what was due to the Plaintiff on Account of *William Bor's* Proportion of the said 2000 *l.*

Respondent's
Bill of Revivor.

The Respondent, in *November 1747*, filed his Bill of Revivor and original Bill against the Appellant, as Heir at Law of *Gerard Bor*, and as Devisee in Tail of *Ballynurry* and *Kilcoole* Estates, in the Will of *Christian*, and against *Mary*, as Administratrix of *Gerard* and others; and thereby, amongst other Things, prayed that the Cause might stand revived against her, and that the said Bill might be taken as an original Bill against the Appellant, and that the Respondent might have the Benefit of the Proofs and Proceedings in the former Cause, and that the Appellant might release all Claim to *Pelletstown*, and the Houses devised to the Respondent by his Father *Christian*, and to have the 2000 *l.* distributed according to the Proviso in his Will; or that the Respondent might be recompensed out of *Ballynurry* and *Kilcoole*, which the Appellant held under the same Will, for such Part of *Pelletstown*, and other the Premises to which the Appellant should appear to be intitled.

Appellant's An-
swer.

The Appellant, by his Guardian, answered this Bill on the 10th of *June, 1748*, and, amongst other Things, insisted, that as *Christian* was only Tenant for Life under *Margaret Bor's* Will, he had no Right to alter any of the Devises therein; and that *John* having suffered no Recovery of *Pelletstown*, or of the Houses, or barr'd the Remainder limited to the Appellant's Father, he had no Power to devise them; and insisted, that upon *John's* Death without Issue, the Appellant's Father became intitled under *Margaret's* Will, and that the Appellant, on the Death of his Father, became intitled thereto, and to the Lands of *Ballynurry* and *Kilcoole*, of which his Father was, under said *Christian's* Will, but bare Tenant for Life; and submitted to the Court, whether the Respondent was intitled to any Part of the Relief he sought.

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The Appellant's Mother having appeared to the said Bill, an Order was obtained to revive the Cause against her; and the said Sir Thomas Taylor, and the other Defendants, having answered, issue was joined, and several Witnesses were examined. But the said Robert Baldwin, the Heir of Arthur and Editha Baldwin, having died without Issue, the Respondent filed a Bill of Revivor against Bridges Baldwin, as Heir at Law of Robert, and against William Longfield, as Heir of Law of Editha, and the Cause was by Order revived against them.

The Master's
Report in Mary's
Cause.

The Master made his Report in Mary Bor's Cause, by which the Sum of 1323 l. 17 s. 5 d. $\frac{3}{4}$ was reported due to her for Gerard's Third of the 2000 l. and the Interest thereof, from Christian Bor's Death to the 16th of November, 1749; and the Sum of 441 l. 5 s. 5 d. $\frac{3}{4}$ was reported due to her for the Third of William's Third of the said 2000 l. to which Gerard became intitled on his Death during the said Time; amounting together to 1792 l. 16 s. 7 d.

Final Decree

The said Mary Bor's Cause came on to be heard the 22d of May, 1750, on the Master's Report; and it was then "Decreed that the said Sum of 1792 l. 16 s. 7 d. reported due to her for her Husband's Third of the 2000 l. and his Share of William's Third thereof, with Interest and Costs, should remain a Charge on the Lands settled and made liable to the said 2000 l. as aforesaid, and should be paid her in Six Months; or that in Default, the Lands and Houses in the Settlement of 1717, or a sufficient Part thereof, should be sold for Payment thereof." But the said Lands have not yet been sold.

The Respondent, whose Cause was depending this whole Time, was, by the Neglect of his Agent, disabled from bringing it to a Hearing with the other Cause.

8th June, 1753.
Decree in the
present Cause.

But after some Time the Respondent's Cause came on to be heard on the 15th, 16th, 20th, 22d and 23d Days of June, and 23d Day of December, 1752, the 15th and 18th of May, 1753. At the Hearing the Respondent's Counsel were instructed to waive any Account of the Profits of Pelletstown, against Helena. And his Lordship having taken further Time to consider of the Relief prayed against the other Parties, on the 8th of June, 1753, "Decreed that the Appellant should have Six Months after he should arrive at the Age of Twenty-one Years, to make his Election, whether he would abide by the Will of his Grandfather Christian Bor, or not: And in case he should elect to abide by the Will, that he should convey unto the Respondent for his Life, with such Remainders over as are limited in Christian Bor's Will concerning the same, one Moiety of such Part of Pelletstown, and of the Houses in Michael's-lane, Schoolhouse-lane, and Bor-court, as should remain after discharging what should be due to Sir Thomas Taylor upon his Mortgage: And that he should also account for, and pay over to the Respondent, a Moiety of the Rents, Issues, and Profits of the said Lands, which were received, or might have been received, by the Appellant, without wilful Default, from his coming into Possession thereof, Allowance being made for Payments on the foot of the Mortgage.

"And in case the Appellant should not elect to abide by the Will, as to the Devise of Pelletstown, and Houses in Michael's-lane, Schoolhouse-lane, and Bor-court, and the One Third Part of the 2000 l. that he should convey to the Respondent so much of the Lands of Ballynurry and Kilcoole, devised to the Appellant's Father, with Remainder to the Appellant, as should be equal to such Moiety of the Lands of Pelletstown, and Houses in Michael's-lane, Schoolhouse-lane, and Bor-court, and such Moiety of the Rents, Issues, and Profits thereof; and also to a Moiety of One Third Part of the 2000 l. or so much thereof as should come to the Hands of the Appellant. And it was further decreed, that until such Time as the Appellant should attain his Age, he should receive the Rents of Ballynurry and Kilcoole, or of the Moiety of Pelletstown, and of the Houses in Michael's-lane, Schoolhouse-lane, and Bor-court, at the Election of his Guardian or Guardians for the Time being, without Prejudice, and subject to the Order of this Court; and, during the said Time, the Respondent should receive the Rents and Profits of the said other Lands, without Prejudice, and subject to the Order of this Court. And it was further ordered, that it should be referred to Master Stopford, to take an Account of the Rents, Issues, and Profits of Pelletstown, and the Houses in Michael's-lane, Schoolhouse-lane, and Bor-court, and of the Lands of Ballynurry and Kilcoole, which the Appellant, or Gerard Bor deceased, respectively received, or might have received, from the Time they respectively came into Possession thereof. And in case the Defendant Mary should not, as Administratrix of Gerard, admit Assets in her Hands, it was referred to the said Master to take an Account of the Assets of Gerard which came to her Hands; and on the said several Accounts all just Allowances were to be given, with other usual Directions."

From this Decree the Appellant has appealed to your Lordships; but the Respondent humbly hopes that your Lordships will affirm the said Decree, with Costs, for the following (among many other)

R E A S O N S.

- I. The Testator Christian Bor, at the Time of making his Will, enjoyed several Estates, as Tenant for Life, under the Will of Margaret Bor. He had the Lands of Ballyawly, &c. for Life, with Remainders limited to his first and other Sons, in Tail Male. By the Death of his two Brothers Jacob and Benjamin, without Issue, under the same Will, he became intitled in Possession, for his Life, to the Lands of Pelletstown, &c. with like Remainders over. And by Descent from his Uncle Gerard, he was also seised in Fee of the Lands of Ballynurry and Kilcoole. Being seised of these several Estates, he considered of a Provision for all his Sons: His eldest Son John having a Right to enjoy the Lands of Ballyawly and Pelletstown, as Tenant in Tail, by the Will of Margaret, the Testator made no present Addition to his Fortune: To his three younger Sons, Gerard, Jacob, and William, he made several Devises; some of which he could make, and others he could not. In the first place, he devised the 2000 l. charged on the Lands of Ballyawly, &c. to be divided equally between them. This was only repeating the Trust in his Marriage Settlement of 1717. Then he devised the Lands of Ballynurry, &c. (which he had Power to devise) to his second Son Gerard, for Life, with Remainder to his first and other Sons in Tail Male, with Remainders over. This Devise might, and did take Effect in Possession, upon the Death of the Testator, during the Life of John. Next he devises the Lands of Pelletstown, &c. to his third and fourth Sons, Jacob and William, in Moieties, for Life, with Remainders to their first and other Sons. The Testator, having no Power to make this Devise, has added a Proviso; that, in case his Devise of Pelletstown could not take Effect, for want of Power, the Share of the 2000 l. accruing to Gerard, should go to Jacob and William. This shews, the Testator knew, that his Intention to give Pelletstown, in favour of his third and fourth Sons, was liable to be defeated by his two eldest Sons, John and Gerard, who were intitled, in order of Succession, under the Limitations in Tail, by Margaret's Will. If John defeated the Will (to whom the Father proposed no Election, or Inducement to the contrary) still it was intended, that Jacob and William should have Gerard's Share of the 2000 l., because a better Provision was given to Gerard, by the Devise of Ballynurry. If John did nothing to defeat the Will, and died without Issue, by which Gerard's Remainder in Tail of Pelletstown (under Margaret's Will) would take Effect, then, not only the express Proviso would operate to give Gerard's Share of the 2000 l. Charge to Jacob and William, but the implied Condition would likewise operate to affect the whole Estate of Ballynurry, and the Interest of Gerard, and his Issue; which Condition is this: That whoever will enjoy under the Will an Estate, which the Testator had Power to devise, shall acquiesce in those Devises which he had no Power to make.
- II. In Consequence of the Events, which have happened, the Devise of Pelletstown can only be effectuated, or a Compensation secured for it, by the Election which the Decree has proposed to the Appellant,

pellant, the Son of Gerard. John did nothing to defeat the Will, but soon after attaining his Age of twenty-one, and a little before his Death, covenanted to confirm it, as against the Acts of himself and those claiming under him. On the Death of John without Issue, Gerard, the Appellant's Father, elected to enjoy Pelletstown, and mortgaged it. Gerard's Assets are therefore liable to make a Satisfaction for the Profits of Ballynurry, during his Time: and the Decree has directed an Account, both of his Assets, and of those Profits. But this Election could not bind the Appellant, his Son, because Gerard the Father, by the Will was only Tenant for Life, of Ballynurry, and his Son was Owner of the Inheritance. It falls therefore on the Son to make the Election, when he comes of Age, as being intitled to the Fee simple of Pelletstown (subject to his Father's Mortgage, which was secured by Fine and Recovery) and as Tenant in Tail of Ballynurry. If he elects to take by Christian Bor's Will, then a Moiety of Pelletstown must be conveyed to the Respondent. If not, then a Satisfaction must be made out of Ballynurry, not only for a Moiety of Pelletstown, but for a Moiety of Gerard's (his Father's) Third of the 2000*l.* in Case the Whole, or any Part of it, shall come to his Hands. The Reason why the Decree has laid both these Charges on Ballynurry, is, because the Fund which he had Power to devise, must be the Security to compensate for the Loss of every thing which the Testator had no Power to devise, so far as the Devisees of that Fund do any Act to defeat the Will.

- III. The Respondent, by Reason of several Abatements and the Neglect of his Agent, has laboured under some Disadvantages, in not having been able to bring his own Cause to hearing, at the same Time with the Cause originally instituted by Gerard, and revived by Mary. And therefore, notwithstanding he insisted on the same Right by his Answer in that Cause, as by his present Bill, it was impossible that any Notice could be taken of it, or Relief given upon it at that time; Mary, the Administratrix of Gerard, being clearly intitled to a Decree against the Trustees in the Settlement of 1717, to recover her Husband's Share of the 2000*l.* provided by way of Charge for the younger Children of Christian, and likewise to recover his distributive Share of such Proportion of that Sum, as might belong to his deceased Brother William. But the whole Merits having now been brought before the Court, between all the proper Parties, the Respondent hopes, and humbly insists, that the Decree appeal'd from is just, and ought to be affirmed.

Die Jovis 22^o Januarij 1756.

C. YORKE.
K. EVANS.

It is declared, that the Testator Christian Bor having by an express Devise in his Will directed to what New Provision should be made for his younger Sons Jacob & William, in case he had not power to Devise his Lands in Pelletstown, & the Houses in Michael's Lane, School-house Lane & Bor Court, and consequently that Devise should be defeated, no implied Condition arises upon the said Will to oblige the Appellant to make his Election whether he will abide by the said Devise, or convey to the Respondent Jacob so much of the Lands of Ballynurry & Kilcoble as should be equal in Value to the Moiety of the Lands & Houses first mentioned; But that the Appellant's Father Gerard Bor having enjoyed the said Lands of Ballynurry & Kilcoble during his Life, did thereby elect to abide by the Devise of the said Lands of Ballynurry & Kilcoble, and therefore ought to have permitted the Respondent Jacob Bor to have the benefit of one Moiety of the said Gerard's Third of the 2000*l.* mentioned in the said Will, unless the said Jacob has or shall receive a Compensation for the Moiety of Pelletstown & the Houses before mentioned according to the Limitations in the said Christian Bor's Will out of the Assets personal or real of John Bor by virtue of the said John Bor's Covenant in the Deed of the 27th of March 1740 for confirming his Father's Will as to the Devise of Pelletstown & the Houses before mentioned; And it is therefore ordered & adjudged, that the said Decree complained of in the said Appeal & the same is hereby reversed, and that the Respondent Jacob Bor's Bill be dismissed without Costs, but without prejudice to his applying to the said Court of Chancery in Ireland to recover the former Cause wherein the Decree of the 4th of Aug^r 1747 was made, or to revive the said Decree according to the Course of that Court, and also without prejudice to his bringing any new Bill for Relief in the Premises, consistent with this Judgment, as he shall be advised.

To be heard at the Bar of the House of Lords, on Monday the 19th Day of January, 1756.

The Respondent Jacob Bor's CASE.

Jacob Bor, Esq; and others,

Respondents;

Gerard Bor, a Minor, by William Cooper, Esq; his Guardian, } Appellant.